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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6356

JOHN DOE, BY HIS GUARDIAN, MARY DOE, AND RICHARD ROE, BY HIS GUARDIAN, MARY ROE, PETITIONERS

v.

JOHN L. McMILLAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE LEGISLATIVE RESPONDENTS[1]

OPINIONS BELOW

The oral opinion of the district court (A. 38–41) and its order dismissing the complaint (A. 48–50) are not reported. The majority and dissenting opinions in the court of appeals (A. 67–113) are reported at 459 F.2d 1304. Majority and dissenting opinions in

[1] This brief is filed on behalf of the following respondents: Nineteen Members of Congress who were the Chairman and some of the Members of the Committee on the District of Columbia of the House of Representatives in the 91st Congress, the clerk, the staff director, counsel, a consultant and an investigator of the Committee, the Public Printer and the Superintendent of Documents of the Government Printing Office.

the court of appeals on petitioners' application for continuation of an earlier injunction pending appeal (A. 57–64) are reported at 442 F.2d 879.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1972 (A. 115). The petition for a writ of certiorari was filed on March 18, 1972, and granted on June 26, 1972 (A. 117). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Speech or Debate Clause of the Constitution and the official immunity doctrine preclude claims for declaratory relief, injunction and damages against Members, employees and agents of the United States House of Representatives based upon a valid legislative act, i.e., the publication of a duly authorized Committee report which was printed by the House.

2. Whether a report of a Committee of Congress can constitute a Bill of Attainder.

3. Whether the Separation of Powers Doctrine precludes the judiciary from interfering with legislative prerogatives such as are presented here.

CONSTITUTIONAL PROVISIONS, STATUTES AND HOUSE RESOLUTION INVOLVED

Constitution:

Article I, Section 1:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 6:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Article I, Section 8:

> The Congress shall have Power * * *
>
> * * * * *
>
> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States,* * *
>
> * * * * *
>
> No Bill of Attainder or ex post facto Law shall be passed.

Statutes:

Title 44, U.S.C.:

> § 301. The President of the United States shall nominate and, by and with the advice and consent of the Senate, appoint a suitable person, who must be a practical printer and versed in the art of bookbinding, to take charge of and manage the Government Printing Office. His title shall be Public Printer. He shall give bond approved by the Secretary of the Treasury

in the sum of $25,000 for the faithful performance of the duties of his office.

§ 501. All printing, binding, and blank-book work for Congress, the Executive Office, the Judiciary, other than the Supreme Court of the United States, and every executive department, independent office and establishment of the Government, shall be done at the Government Printing Office, * * *

§ 701. (a) The order by either House of Congress to print a document or report shall signify the "usual number" of copies for binding and distribution among those entitled to receive them * * *

(b) The "usual number" of documents and reports shall be one thousand six hundred and eighty-two copies, which shall be printed at one time and distributed as follows:

Of the House documents and reports, unbound—to the Senate document room, one hundred and fifty copies; to the office of the Secretary of the Senate, ten copies; to the House document room, not to exceed five hundred copies; to the office of the Clerk of the House of Representatives, twenty copies; to the Library of Congress, ten copies, as provided by section 1718 of this title.

* * * * *

§ 1702. The Public Printer shall appoint a competent person to act as Superintendent of Documents who shall be under the control of the Public Printer.

* * * * *

> The Superintendent of Documents * * * shall have general supervision of the distribution of all public documents, and to his custody shall be committed all documents subject to distribution, excepting those printed for the special official use of the executive departments, which shall be delivered to the departments, and those printed for the use of the two Houses of Congress, which shall be delivered to the Senate Service Department and House of Representatives Publications Distribution Service and distributed or delivered ready for distribution to Members upon their order by the Superintendents of the Senate Service Department and House Publications Distribution Service, respectively.

House Resolution 76, 91st Cong., 1st Sess., February 5, 1969, 115 Cong. Rec. 2784:

> *Resolved,* That the Committee on the District of Columbia, acting as a whole or by subcommittee, is authorized to conduct a full and complete investigation and study of the following:
>
> (1) the organization, management, operation, and administration of any department or agency of the government of the District of Columbia;
>
> (2) the organization, management, operation, and administration of any independent agency or instrumentality of government operating solely in the District of Columbia; * * *
>
> For the purpose of carrying out this resolution the committee or subcommittee is authorized to sit and act during the present Congress

at such times and places within the United States, whether the House is in session, has recessed, or has adjourned, to hold such hearings, and to require, by subpena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents, as it deems necessary; except that neither the committee nor any subcommittee thereof may sit while the House is meeting unless special leave to sit shall have been obtained from the House. Subpenas may be issued under the signature of the chairman of the committee or any member of the committee designated by him, and may be served by any person designated by such chairman or member.

The committee shall report to the House as soon as practicable during the present Congress the results of its investigation and study together with such recommendations as it deems advisable. Any such report which is made when the House is not in session shall be filed with the Clerk of the House.

* * * * *

STATEMENT

Petitioners seek declaratory and injunctive relief against further publication and distribution of a congressional document, a report of a Committee of the House of Representatives, and sue for both punitive and compensatory damages for alleged violations of their "statutory, regulatory, administrative, common law, and constitutional rights" (A. 5).

The report in question (H. Rep. No. 91-1681, 91st Cong., 2d Sess. (1970)) is a study of the District of

Columbia public school system, conducted on behalf of the Committee on the District of Columbia of the House by a Special Select Subcommittee under the authority of H. Res. 76, 91st Cong., 1st Sess. (1969) (*supra*, p. 5).

In the opening pages of the report (pp. 1–6) the Committee makes thirty-six specific findings, resulting from more than seven months of investigation and study and fourteen hearings at which members of the School Board and other school and city officials testified.

Included within the 450 page report, as a small part of the supporting data for the Committee's findings, are copies of absence sheets, lists of "class cutters", copies of certain test papers and copies of various documents relating to several students who presented disciplinary problems at one school (pp. 212–253, 256–258). The report states that these were "printed to give a realistic view of . . . [a] troubled school and the lack of administrative efforts to rectify the multitudinous problems there" (p. 212); to show the poor reading ability of seventh graders given a fifth grade history test (p. 223); to outline the conduct of a student which did not result in suspension (p. 253); and to illustrate "suspension problems" (pp. 256–258). These documents were given to an investigator for the Committee by employees of the District of Columbia School System (*infra*, pp. 38–39) in the course of his activities as a committee aide. These inclusions in the report are the gravaman of petitioners' complaint against the legislative respondents on whose behalf this brief is filed.

The Committee report was transmitted to the House by the Chairman of the Committee (A. 47), was referred to the Calendar of the Committee of the Whole House on the State of the Union and was ordered to be printed. (A. 44; 116 Cong. Rec. H11347). Thereafter the report was printed and distributed by the Government Printing Office in accordance with the provisions of 44 U.S.C. 501 and 701.[2]

Additional details are stated in the course of the Argument.

SUMMARY OF ARGUMENT

I

The majority and dissenting opinions in *Gravel v. United States,* 408 U.S. —— (1972),[3] coalesce as a unanimous holding that the legislative respondents are immune from "question[ing] in any other Place" for or on account of the matters of which petitioners complain.

Petitioners' complaint is a suit upon a report issued by the House Committee on the District of Columbia pursuant to the House's authorization to conduct "a

[2] In footnote 3 on page 11 of petitioners' brief, it is noted that one copy of 48 pages of the report was submitted in a sealed envelope, together with a letter to the Clerk of the Court requesting that it be made available for inspection only by court personnel. Because of this partial submission and due to the fact that legislative respondents have found it necessary to refer to other parts of the report, we are submitting nine (9) complete copies of H. Rep. No. 91-1681 to the Clerk for the use of the Court and its personnel.

[3] The official report of these opinions and the opinions in the companion case of *United States* v. *Brewster*, 408 U.S. —— (1972), had not been printed when this brief was filed. References throughout this brief are to the Slip Opinions.

full and complete investigation and study of . . . the organization, management, operation, and administration of any independent agency or instrumentality of government . . . in the District of Columbia". The report was ordered to be published pursuant to the rules of the House. There can be no question that the Speech or Debate Clause extends to all parts of the report and to all aspects of the Committee's legislative activities in the investigation, compilation and publication of the report. ". . . Committee reports, resolutions, and the act of voting are equally covered" by the Clause. *Gravel* v. *United States,* Slip Op. 11. Accord, Douglas, J., dissenting, Slip Op. 3; Brennan, J., dissenting, Slip Op. 2–3; *United States* v. *Brewster,* Slip Op. 8, 11–12, 24; Brennan, J., dissenting, Slip Op. 4. Specifically, the inclusions in the report which are the gravamen of petitioners' complaint are protected. The "introduction of documents or other exhibits in the record the committee or subcommittee is making" is a legislative act within the coverage of the Clause. *Gravel,* Douglas, J., dissenting, Slip Op. 3.

Just as the Member-respondents are immune under the Speech or Debate Clause, so also are the aide-respondents under the unanimous holding in *Gravel* (Slip Op. 9–10; Douglas, J., dissenting, Slip Op. 5; Brennan, J., dissenting, Slip Op. 1), including respondent Martin, the investigator of the Committee who obtained the school records included in the report of which petitioners complain.

Respondents Public Printer and Superintendent of Documents are also within the protection of the clause. That the printing of bills, reports, debates,

hearings, etc., is an absolutely essential part of the legislative process has not been seriously disputed. The Government Printing Office is a part of the legislative branch of the Government; the Public Printer was once officially titled the "Congressional Printer";[4] and the rules of the House and Senate require printing as a condition precedent to further legislative action in most cases.[5] The Congress is required by statute[6] to have its printing done at the Government Printing Office and the man charged by law with the duty to "take charge of and manage the Government Printing Office" is required to be appointed by the President by and with the advice and consent of the Senate. During fiscal year 1970, more than 41 million publications were printed for the Congress.[7]

The particular report involved in this case was printed and distributed pursuant to the rules of the House. Legislative documents so printed and distributed are in no sense publications of the Government Printing Office; they are the publications of the Senate or House or Congress as a whole and the

[4] See Act of February 22, 1867, Section 3758 of the Revised Statutes of June 22, 1874.

[5] See for example clause 2 of Rule XVIII (section 821) of the Rules of the House of Representatives (page 457 of House Document No. 439, 91st Congress, 2d Session) which provides in part:

"* * * and all bills, petitions, memorials, or resolutions reported from a committee shall be accompanied by reports in writing, which shall be printed."

[6] 44 U.S.C. 501, supra, p. 4.

[7] See Table 11 of the Annual Report of the Public Printer for fiscal year 1970.

printing and distribution of such a document are as much legislative acts as are the legislative activities involved in the compilation of the document itself. In the performance of his functions of printing and distributing such documents, the Public Printer (and the Superintendent of Documents insofar as he participates in such activities) is as much the "alter ego" (*Gravel,* Slip Op. 10) or "surrogate" (*id.,* Douglas, J., dissenting, Slip Op. 5) of the legislative body as are the other aides who assist the legislators in their legislative tasks. In addition, these two officials are within the protection of the official immunity as applied in *Barr* v. *Matteo,* 360 U.S. 564 (1959), and *Wheeldin* v. *Wheeler,* 373 U.S. 647 (1963).

II

Petitioners' attempts to avoid the unanimous holding in *Gravel* as to the immunity of the legislative activities involved here are unavailing. The gravamen of their complaint is that the publication in the report of the names of their children violated their and their children's rights of privacy. The familiar cases under the First, Fourth, Fifth and Fourteenth Amendments which they invoke do not support their claims of violation of their rights and those cases are inapposite in any event because they did not involve the Speech or Debate Clause.

Petitioners also invoke the *Kilbourn* v. *Thompson,* 103 U.S. 168 (1881), *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), and *Powell* v. *McCormack,* 395 U.S. 486 (1969), line of cases and the Court's characterization of those cases in *Gravel* as creating an exception

from the Speech or Debate Clause for "illegal or unconstitutional conduct" (Slip Op. 13) as support for their attempt to pierce the privilege. The answer to this is first, there was no illegal or unconstitutional conduct and, secondly, that we are here concerned with a committee report. The protection of the Speech or Debate Clause applies absolutely to such a document and all the other legislative activities associated with it. From beginning to end—from the House's authorization of the Committee's investigation and study to the printing and publication of the report—the activities connected with the report were covered by the Clause as ". . . 'things generally done in a session of the House . . . in relation to the business before it.'" *Gravel,* Slip Op. 11.

Even so, petitioners contend that the bar of the Speech or Debate Clause does not apply here. Their case comes down to this: there was an alleged unconstitutional invasion of the right of privacy in the means whereby the Committee obtained the school records included in the report about which they complain; that alleged unconstitutional action tainted the report itself; ergo, they are entitled to sue the Members and their aides on the report. Again, the answer is that the report is absolutely privileged, regardless of what it contains. And the privilege extends to the Members and their aides who participated and assisted in the legislative activities of conducting the investigation and hearings, introducing documents and exhibits into the record, and compiling and publishing the report on the basis of the record so made.

Moreover, there was, on petitioners' own allegations, no violation of their rights in the Committee's obtention of the school records. Petitioners had no proprietary or possessory interest in them. They were records of the school system. All that petitioners alleged was that employees of the system "gave" the records to respondent Martin, the Committee's investigator. There is not in these allegations the slightest resemblance to *Dombrowski* v. *Eastland, supra,* which is the basis of petitioners' claim of a cause of action against Martin. Petitioners cannot remake their case here to fit the *Eastland* exception from the Speech or Debate Clause by their gratuitous assertions that Martin "surreptitiously" "seized petitioners' private school records". As an aide of the Committee, respondent Martin stands in the same protected position as a Member, had the Member performed the legislative act of receiving the records for the purposes of the Committee's investigation.

III

Petitioners' contention that the report constitutes a bill of attainder is frivolous. By definition, a bill of attainder is a " 'special statute * * * by which a man [is] pronounced guilty or attainted of some crime, and punished by deprivation of his vested rights, without trial or judgment per legem terrae' ". *United States* v. *Lovett,* 328 U.S. 303, 322 (1946), Frankfurter, J., concurring. Petitioners' attempt to equate the Committee report in question to an enacted law, the only form of legislative action which can constitute a bill of attainder, is contrary to reason and authority.

IV

Since Article I, Section 1 of the Constitution vests all legislative power of the United States in the Congress, judicial inquiry into Congressional motives, and judicial censorship of Committee reports are violative of the Separation of Powers Doctrine.

This Court, in *O'Donoghue* v. *United States,* 289 U.S. 516 (1933) at 530, recognized the importance of this Doctrine when it found unconstitutional a congressional attempt to reduce judicial salaries. And, in *Methodist Federation for Social Action* v. *Eastland,* 141 F. Supp. 729 (1956), a three-judge Court, on facts similar to those presented here, found no authority to prevent Congress from publishing a document, pointing out that the inclusion of erroneous or defamatory matter is solely within the discretion of Congress.

ARGUMENT

I

GRAVEL V. UNITED STATES STANDS AS A UNANIMOUS HOLDING THAT THE SPEECH OR DEBATE CLAUSE AFFORDS ABSOLUTE IMMUNITY TO THE LEGISLATIVE RESPONDENTS IN THIS CASE

The majority and dissenting opinions in *Gravel* v. *United States* and the companion case of *United States* v. *Brewster* contain an exhaustive review of the history, purpose and application of the Speech or Debate Clause. In totality, they constitute a veritable encyclopedia of the learning and law on the subject. There is no need to go beyond those opinions in the search for the correct answers to the questions in-

volved in this case concerning the immunity of the legislative respondents under the Clause. It is our position that the majority and dissenting views in *Gravel* coalesce as a unanimous holding that these respondents are immune from "question[ing] in any other Place" for or on account of the matters of which petitioners complain.

A. *The Challenged Report.* "The Congress shall have Power * * * To exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia. Constitution, Art. I, § 8. This legislative power encompasses a broad investigating authority. "The scope of the power of inquiry * * * is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt* v. *United States,* 360 U.S. 109, 111 (1959).

The Committee on the District of Columbia is a standing committee of the House of Representatives. It was authorized by House Resolution 76 (supra, p. 5) to "conduct a full and complete investigation and study of . . . (1) the organization, management, operation, and administration of any department or agency of the government of the District of Columbia . . . [and] (2) . . . of any independent agency or instrumentality of government operating solely in the District of Columbia . . ." (A. 45). House Resolution 76 also directed the Committee to report to the House "during the present Congress the results of its investigation and study together with such recommendations as it deems advisable." (*supra,* p. 6). Pursuant to this authorization and direction, a Special Select Subcommittee of the Committee on the Dis-

trict of Columbia conducted an exhaustive investigation, including hearings, of the public school system of the District. On December 8, 1970, the Chairman of the Committee transmitted to the Speaker of the House of Representatives "an interim report of the Committee on the District of Columbia . . . based upon the hearings and investigation of the" subcommittee (A. 47). Thereafter this 450 page report was in turn "Committed to the Committee of the Whole House on the State of the Union and ordered to be printed" (A. 44; 116 Cong. Rec. H11347). The report, entitled "Investigation and Study of the Public School System of the District of Columbia", was printed and distributed by the Government Printing Office as House Report No. 91–1681, 91st Cong., 2d Sess. Under the heading "Solutions" (pp. 448–449) the Committee listed 27 recommendations of statutory and administrative remedial measures to correct what it characterized as a school system "floundering in its own incompetence" (p. 450). For example, the Committee stated that laws should be enacted "making parents responsible for their children's acts of vandalism" and requiring "teachers to return to summer school, travel in their free time or do other acts of continuing education, in an effort to stay abreast of new ideas and teaching techniques" (p. 448). It is apparent that many of the Committee's recommendations would affect appropriations for the school system. Among its "Conclusions" (p. 450), the Committee

> urged that laws be enacted immediately to curb the abuse of the waste of Federally appropriated funds; that an audit of the District of Columbia Public School System by the General Accounting Office be requested for the years 1968–69 and 1969–70; that it be required by law that one or more metropolitan police be stationed at school buildings on a 24 hour basis where the need dictates and that the D.C. Metropolitan Police Department enforce the narcotics laws now available to it on a city-wide basis in general, and as to the Public Schools in particular.

There can be no question that the Speech or Debate Clause covers this House report.

> . . . The clause . . . speaks only of "Speech or Debate", but the Court's consistent approach has been that to confine the protection of the Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view. *Committee reports,* resolutions, and the act of voting are equally covered; "[i]n short . . . things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson,* 103 U.S. 168, 204 (1881), quoted with approval in *United States* v. *Johnson,* 383 U.S. 169, 179 (1966).... [Emphasis added.][8]

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[8] *Gravel* v. *United States*, Slip Op. 11. Accord, Douglas, J., dissenting, Slip Op. 3; Brennan, J., with whom Douglas and Marshall, JJ., joined, dissenting, Slip Op. 2–3. See also *United States* v. *Brewster*, Slip Op. 8, 11–12, 24; Brennan, J., dissenting, Slip Op. 4.

This broad immunity extends, of course, to any and all proceedings, civil or criminal, outside the halls of Congress. *Gravel* v. *United States,* Slip Op. 9; Douglas, J., dissenting, Slip Op. 3–4; *United States* v. *Brewster,* Slip Op. 14; Brennan, J., dissenting, Slip Op. 6; White, J., dissenting, Slip Op. 3.

The Speech or Debate Clause's protection of the report in question extends to all its parts and to all aspects of the Committee's legislative activities in the investigation, compilation and publication of the report. All such matters were "things generally done in a session of the House". *Gravel* v. *United States,* Slip Op. 11. The investigation and hearings, the gathering of data from sources within the school system of the District of Columbia, the compilation of the report, its submission to the Speaker and commitment to the Whole House on the State of the Union, the Rules of the House that ordered it to be printed, and the printing and distribution of the report by the Government Printing Office were all legitimate legislative activities of the clearest kind.

The particular portions of the report of which petitioners complain consist of records the Committee cited as supporting its findings. The complaint describes these records as "(1) copies of attendance records of Jefferson Junior High School for several days during 1970 (pages 213 to 223) . . . includ[ing] the names of numerous students . . . whose parents are plaintiffs herein; (2) various test papers carrying the names and grades of students at the Jefferson Junior High School whose parents are plaintiffs herein (pages 224 to 252); and (3) various letters and

memoranda regarding alleged disciplinary problems of students at the Jefferson Junior High School, whose parents are plaintiffs herein (pages 256 to 258)" (A. 8). It was alleged "[u]pon information and belief" that respondent "Savoid [the Principal of Jefferson Junior High School] gave [respondent] Martin [an investigator of the Committee] copies of the disciplinary letters printed in the report and other materials and . . . [that respondent] Irven [a teacher at Jefferson Junior High School] gave . . . Martin copies of the attendance lists, the school test papers . . . and other materials"; that Savoid and Irven "were not authorized to release these documents"; and that Martin "delivered" copies of the described materials to respondent "Little, who, as a contract consultant to the Committee, was responsible for the preparation of the report . . . [and who] caused the copies of the papers referred to above to be included in a draft of the report [which respondent] members of the United States House of Representatives approved . . . for publication" (A. 9).

These very allegations defeat petitioners' contention that the portions of the report of which they complain are not immunized against their suit by the Speech or Debate Clause. The Court noted in *Gravel* (Slip Op. 18) that

> The heart of the clause is speech or debate in either House, and insofar as the clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings

with respect to matters which the Constitution places within the jurisdiction of either House.

Nothing contributes more to the "communicative processes" of the House than committee reports. And as Mr. Justice Douglas pointed out in his dissenting opinion in *Gravel* (Slip Op. 3–4):

> One of the things normally done by a member "in relation to the business before it" is the introduction of documents or other exhibits in the record the committee or subcommittee is making. The introduction of a document into a record of the Committee or subcommittee by its Chairman certainly puts it in the public domain. Whether a particular document is relevant to the inquiry of the committee may be questioned by the Senate in the exercise of its power to prescribe rules for the governance and discipline of wayward members. But there is only one instance, as I see it, where supervisory power over that issue is vested in the courts, and that is where a witness before a committee is prosecuted for contempt and he makes the defense that the question he refused to answer was not germane to the legislative inquiry or within its permissible range. See *Uphaus* v. *Wyman,* 360 U.S. 72; *Kilbourn* v. *Thompson, supra,* at 190.
>
> In all other situations, however, the judiciary's view of the motives or germaneness of a Senator's conduct before a committee is irrelevant. For, "[t]he claim of an unworthy purpose does not destroy the privilege." *Tenney* v. *Brandhove* 341 U.S. 367, 377. If there is an

> abuse, there is a remedy; but it is legislative, not judicial.[9]

See also Brennan, J., dissenting in *Gravel* (Slip Op. 15): "The receipt of materials for use in a congressional hearing is an integral part of the preparation for that legislative act."

In another aspect, the report in all respects falls within the sphere of protected legislative activity. The very title of the report—Investigation and Study of the Public School System of the District of Columbia—implies that one of the purposes of the Committee (and of the House itself in its broad grant of authority in H. Res. 76, *supra,* p. 5) was to inform the Congress and the public of conditions in the system.

> . . . That this "informing function" falls into the class of things "generally done in a session of the House by one of its members in relation to the business before it," *Kilbourn* v. *Thompson,* 103 U.S. 168, 204 (1881), was explicitly acknowledged by the Court in *Watkins* v. *United States,* 354 U.S. 178 (1957). In speaking of the "power of Congress to inquire into and publicize corruption, maladministration or

[9] Petitioners cite *United States* v. *Rumely*, 345 U.S. 41 (1953), *Watkins* v. *United States*, 354 U.S. 178 (1957), and *Barenblatt* v. *United States*, 360 U.S. 109 (1959) (Br. 32, 34–35, 40–41) in support of their contention that the Speech or Debate Clause does not foreclose judicial oversight here. These cases are wide of the mark. They were prosecutions for contempt, the "only . . . instance," as Mr. Justice Douglas pointed out, supra, p. 20, in which the Clause does not foreclose judicial review of the proceedings of a committee of Congress.

> inefficiency in the agencies of Government," the Court noted that "[f]rom the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature." *Id.,* at 200, n. 33. Brennan, J., dissenting in *Gravel,* Slip Op. 2–3.

There was no disagreement in *Gravel* as to the Speech or Debate Clause's coverage of a committee report or, specifically, as to matters such as those of which petitioners here complain. "Committee Reports, resolutions and the act of voting are equally covered [by the Clause] . . ." (Slip Op. 11). The "introduction of documents or other exhibits in the record the committee or subcommittee is making" (Douglas, J., *supra*) and the publication of the report by the House in the exercise of the informing function (Brennan, J., *supra*), as well as the purely legislative function (see the Committee's recommendations for legislation, *supra,* pp. 16–17), are equally protected under both the majority (Slip Op. 9, 11, 17, 18) and dissenting views. The issue on which the Court divided in *Gravel* involved what the majority characterized as the Senator's "private publication" of the Pentagon Papers "through the cooperation of Beacon Press", an activity "in no way essential to the deliberations of the House." "Insofar as we are advised, neither Congress nor the full committee ordered or authorized the publication. We cannot but conclude that the Senator's arrangements with Beacon Press were not part and parcel of the legislative process" (Slip Op. 19). The dissenters' views were that Senator Gravel's activities in this regard were "as much

a part of the Speech or Debate Clause philosophy as mailing under a frank a Senator or a Congressman's speech across the Nation" (Douglas, J., Slip Op. 4); that even private publication fell within "the legislator's duty to inform the public about matters affecting the administration of government" (Brennan, J., Slip Op. 2). The ground of Mr. Justice Stewart's partial dissent was that the Court's protective order (Slip Op. 22) permitted questioning "before a grand jury about sources of information used in preparation for legislative acts," a matter which he thought was within the coverage of the Speech or Debate Clause (Stewart, J., Slip Op. 1; see also Brennan, J., Slip Op. 15–17).

No such questions are implicated in the instant case. Not one step in the entire process which culminated in the House's publication of its committee's report involved extra-legislative activity. Each and every phase of the investigation and report was part and parcel of the legislative process in the most routine sense. As such, *Gravel* stands as a unanimous holding that in no respect can the report "be questioned in any other Place". Petitioners' attempt to invoke "judicial oversight" (see *Gravel,* Slip Op. 11) of the portions of the report which they claim offended their "rights to privacy and the confidentiality of their school papers" (A. 10–11) is thus barred by the Speech or Debate Clause. Their complaints amount to an attempt to censor the report and are nothing more than an attack upon the judgment of the Committee in not disguising the identity of the students named in the records the Committee incorporated in the re-

port. But such matters of judgment, like questions of relevance, are for the legislators to decide. ". . . [T]he judiciary's view of the motives or germaneness of . . . [the Committee's] conduct . . . is irrelevant . . ." Douglas, J., dissenting in *Gravel,* Slip Op. 3–4. A difference of opinion as to the propriety of the Committee's judgment affords no basis for calling it into question "in any other Place". Refering to situations involving much more drastic consequences than are involved here, the Court said in *United States* v. *Brewster* (Slip Op. 15–16):

> * * * In its narrowest scope [i.e., "in the regular course of the legislative process", *id.* 24], the [Speech or Debate] Clause is a very large, albeit essential grant of privilege. It has enabled reckless men to slander and even destroy others with impunity, but that was conscious choice of the Framers.
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> The authors of our Constitution were well aware of the history of both the need for the privilege and the abuses that could flow from too sweeping safeguards. In order to preserve other values, they wrote the privilege so that it tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens, * * *.

B. *The Individual Immunities of the Legislative Respondents.* These respondents fall into two categories—Members of the House Committee on the District of Columbia and the aides of the committee. As to the former, there can be no question of their absolute immunity under the Speech or Debate Clause.

As we have shown above, their every activity in the conduct of the investigation and study of the public school system of the District of Columbia pursuant to the authority of House Resolution 76—the employment of aides, the receipt of data gathered by the aides, the hearing of testimony regarding such data and other matters, the compilation of the report, including the Committee's findings and recommendations, the submission of the report to the House and its publication by the House—were activities in the regular course of the legislative process and so, under the unanimous holding in *Gravel* v. *United States,* were not subject to "question[ing] in any other Place". Slip Op. 9, 11, 17, 18; Douglas, J., dissenting, Slip Op. 3; Brennan, J., dissenting, Slip Op. 2–3.

The aide-respondents named in the complaint are Clark, Clerk of the Committee; Gasque, Staff Director; Garber, Counsel; Little, who, it was alleged, "as consultant to the Committee, . . . [was] responsible for the investigation which led to the report complained of herein and prepared said report"; Martin, "who as a sargent [sic] of the D.C. Metropolitan Police Department, and, as an investigator of the Committee, conducted the investigations which were used in the report complained of herein"; Spence, Public Printer (now deceased); and Kling, Superintendent of Documents (A. 7).

There can be no question as to the immunity under the Speech or Debate Clause of the regular staff of the Committee (respondents Clark, Gasque and Garber) and the temporary aides, respondents Little and Martin. Again, *Gravel* stands as a unanimous hold-

ing that all such aides, regular and temporary, are immune from "question[ing] in any other Place" to the same extent as are the members of Congress they assist in the performance of legislative activities. As the Court stated (Slip Op. 9–10):

> We agree with the Court of Appeals that for the purpose of construing the privilege a Member and his aide are to be "treated as one," *United States* v. *Doe*, 455 F.2d 753, 761 (CA1 1972); or, as the District Court put it: The "Speech or Debate Clause prohibits inquiry into things done by Dr. Rodberg as the Senator's [special and temporary (*id.* 2–3)] agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally." *United States* v. *Doe*, 332 F.Supp. 930, 937–938 (Mass. 1971). Both courts recognized what the Senate of the United States urgently presses here: that it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latters' alter ego; and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the executive and accountability before a possible hostile judiciary, *United States* v. *Johnson*, 383 U.S. 169, 181 (1966)—will inevitably be diminished and frustrated.

See also Douglas, J., dissenting, Slip Op. 5: "The aides . . . must be taken as surrogates for the Senator and the confidences of the job that they enjoy are his confidences that the Speech or Debate Clause embrace"; Brennan, J., dissenting, Slip Op. 1: "I fully agree with the Court that a Congressman's immunity under the Clause must also be extended to his aides if it is to be at all effective."

There remains for consideration the status of respondents the Public Printer and the Superintendent of Documents under the immunity of the Speech or Debate Clause. In the instant case, the report was ordered printed and distributed pursuant to the rules of the House and the provisions of Title 44 of the United States Code (*supra,* pp. 3–5). Documents so printed and distributed are in no sense publications of the Government Printing Office; they are the publications of the Senate or House or Congress as a whole, as the case may be. They are published primarily for the information and use of the Members in the performance of their legislative duties. At the same time, the availability of such publications to the public through the facilities of Congress serves the important legislative function of informing the public concerning matters pending before Congress, including "matters affecting the administration of government." Brennan, J., dissenting in *Gravel* v. *United States,* Slip Op. 2, quoted at greater length, *supra,* p. 23. The printing and distribution of a legislative document pursuant to the direction of the legislative body are as much legislative acts as are the activities involved in the compilation of the document

itself. In the performance of his functions of printing and distributing legislative documents, the Public Printer (and the Superintendent of Documents insofar as he participates in such activities) is as much the "alter ego" (*Gravel* v. *United States,* Slip Op. 10) or "surrogate" (*id.,* Douglas, J., dissenting, Slip Op. 5) of the legislative body as are the other aides who assist the legislators in their legislative tasks. By the same token, applying the unanimous holding in *Gravel,* "the Speech or Debate Clause applies not only to a Member [in the instant case, the House action in printing the report] but also to his aides [here the Public Printer and the Superintendent of Documents] insofar as the conduct of the latter would be a protected legislative act if performed by the Member itself" (Slip Op. 11).

There was in this case no extra-legislative activity remotely resembling the "private publication by Senator Gravel through the cooperation of Beacon Press" of the Pentagon Papers, which the Court held "was in no way essential to the deliberations of the House" and was therefore "not part and parcel of the legislative process." *Gravel* (Slip Op. 19). Significantly, the Court noted in this connection that "[t]he Senator had conducted his hearings, the record and any report that was forthcoming were available both to his committee and the House" and that "[i]nsofar as we are advised, neither Congress nor the full committee ordered or authorized the publication" by the Senator (*ibid.*). The clear implication from this is that the printing and distribution of such a "record" or "report" pursuant to the Rules or authorization of

"the House" is "part and parcel of the legislative process" covered by the Speech or Debate Clause. It follows that the activities of the Public Printer and the Superintendent of Documents in printing and distributing the report in question pursuant to the rules of the House and the provisions of Title 44 of the United States Code (*supra,* pp. 3–5) fall well within the legislative immunity.

Moreover, if any further basis for immunizing the officials of the Government Printing Office is necessary, it is found in the Court's reference in *Gravel* to the decision in *Barr* v. *Matteo,* 360 U.S. 564 (1959), as support for its decision that legislative aides are protected by the Speech or Debate Clause. The Court said that the *Barr* decision "embraced similar views" in holding that "the executive privilege recognized in prior cases could not be restricted to those of cabinet rank" but extends as well to "' officers of lower rank in the executive hierarchy' " (Slip Op. 10). On a parity of reasoning, the privilege recognized in *Barr* extends to the Public Printer and the Superintendent of Documents. See also *Wheeldin* v. *Wheeler,* 373 U.S. 647 (1963), a case involving a question of immunity of a legislative employee. The complaint alleged that Wheeler, an investigator of a House committee, had filled in the plaintiff's name on a subpoena without authorization of the committee, the subpoena having been signed in blank by the chairman. The Court sustained dismissal of the complaint on another ground, but also clearly recognized that the test of liability was whether Wheeler was "acting sufficiently within the scope of his authority to bring the [im-

munity] doctrine into play." 373 U.S. at 651. The immunity referred to in *Wheeldin* was not that under the Speech or Debate Clause but the broad and absolute immunity of any government employee acting within the scope of his authority, or, as stated in *Barr* v. *Matteo,* 360 U.S. at 575, for "action . . . taken . . within the outer perimeter of [the] line of duty . . .".[10] Certainly the activities of the Public Printer and the Superintendent of Documents in the case at bar were activities "within the outer perimeter of [the] line of" their duties. (Cf. Pet. Br. 52–58.)

II

PETITIONERS' ATTEMPTS TO CIRCUMVENT THE UNANIMOUS HOLDING IN GRAVEL AS TO THE IMMUNITY OF THE LEGISLATIVE ACTIVITIES HERE ARE UNAVAILING

Quite surprisingly, petitioners do not even mention the unanimous agreement in *Gravel* that the proceedings of the subcommittee involved in that case and any record or report thereof were absolutely privileged as to both the Senator and his aides. They make no effort to explain why that holding does not govern this case. Instead, their principal argument (Pet. Br., Point I, pp. 16–35) amounts to a superficial *ad hominem* appeal that the committee's inclusion of the names of students in its report was wrongful and that there should therefore be a judicial remedy.

[10] Judicial officers are also immune from actions for civil damages caused by their judicial acts. *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967); *Bradley* v. *Fisher*, 13 Wall. 335 (1872). See also *Gregoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2, 1949), cert. denied, 339 U.S. 949, for the rationale of the official immunity doctrine by Judge Learned Hand.

As they conceive it, the remedy is a suit on the report against, *inter alia,* the Members and their aides. The gravamen of their complaint is the publication of the names in the report. Such publication, it is alleged, violated petitioners' "and their children's Constitutional rights and common law rights to privacy and the confidentiality of their school papers" (A. 10–11).

A. *There Has Been No Invasion of Privacy.* Petitioners roam at length among familiar cases under the First, Fourth, Fifth and Fourteenth Amendments (Br. 16 through 35), with particular emphasis upon the Fourth Amendment cases, in their search for a constitutional home for the cause of action they allege in their complaint (A. 9 through 11). However, they fail to cite any authority which demonstrates a constitutional right of privacy in school records which are the property of school officials. In this instance, in Petitioners' own words (See Complaint A. 9), the parties (Savoid and Irven) *"gave"* the complained of material to an aide of a Congressional Committee, which Committee has both the Constitutional and Congressional authority to investigate and report on agencies and departments of the District of Columbia Government. The school records which form the basis of this suit were rightfully kept and in the possession of school authorities. The records were voluntarily given to defendant Martin, an aide to a Congressional Committee. The records dealt with a subject matter in which the Committee had a legitimate right, if not duty, to investigate and report upon. Therefore, there was not an invasion of the "zone of privacy" which this Court recognized

and protected in *Griswold* v. *Connecticut*, 381 U.S. 617 (1965).

Having pointed out that there has been no invasion of the right of privacy, respondents respectfully suggest that in any event the consideration of that claim is secondary to the immunity granted by the Speech or Debate Clause. As the Court's opinion in *Brewster* (Slip Op. 15, 16) pointed out:

> Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative branch, but no more than the statutes we apply, was its purpose to make Members of Congress super-citizens, immune from criminal responsibility. In its narrowest scope, the Clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to slander and even destroy others with impunity, but that was conscious choice of the Framers.

A footnote to this language from *Brewster* (Slip Op. 16, fn 11) further addressed itself to the scope of the immunity:

> "To this construction of the article it is objected, that a private citizen may have his character basely defamed, without any pecuniary recompense or satisfaction. The truth of the objection is admitted .... The injury to the reputation of a private citizen is of less importance to the Commonwealth, than the free and unreserved exercise of the duties of a representative, unawed by the fear of legal prosecutions." *Coffin* v. *Coffin*, 4 Mass. 1, 28 (1808).

B. *The Speech or Debate Immunity is Dispositive of Petitioners' Claims.* More to the point, petitioners invoke (Br. 37–39) the *Kilbourn* v. *Thompson,* 103 U.S. 168 (1881), *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), and *Powell* v. *McCormack,* 395 U.S. 486 (1969), line of cases and the Court's characterization of those cases in *Gravel* as creating an exception from the Speech or Debate Clause for "illegal or unconstitutional conduct" (Slip Op. 13) as support for their attempt to pierce the privilege on the ground that the report violated their and their children's right of "privacy". The answer to this is that we are here concerned with a House report; and, as we have seen, *Gravel* stands as a unanimous holding that such a purely legislative document and all the Members and aides who had any part in its preparation and official publication are covered by the Clause.

There was not here, as there was in *Kilbourn, Eastland, Powell* and *Gravel* (and *Brewster* as well), any action by Members or their aides which went beyond the legitimate, and therefore protected, legislative activities involved in the publication of the report. There was no arrest by an employee of the House (*Kilbourn*), no conspiracy by an aide "to carry out an illegal seizure of records" (the characterization of *Eastland* in *Gravel,* Slip Op. 13), no exclusion of a Representative-elect by House employees (*Powell*), and no arrangement for private publication of documents which had been introduced into the record of a congressional hearing (*Gravel*). *From beginning to end*—from the House's authorization of the Com-

mittee's investigation and study of the public school system of the District of Columbia (H. Res. 76, *supra,* p. 5) to the printing and publication of the report—the activities connected with the report were protected as ". . . 'things generally done in a session of the House . . . in relation to the business before it.'" *Gravel,* Slip Op. 11.

The distinction between such covered legislative activities and extra-legislative activities which are not covered by the Speech or Debate Clause was sharply drawn in the very sentence in which the Court in *Gravel* excepted "illegal or unconstitutional conduct" from its shield: the Court went on to say that the Clause nevertheless applies where it is "essential to foreclose executive control [i.e., "question[ing] in any other place"] of legislative speech or debate and associated matters such as voting and *committee reports and proceedings*" (Slip Op. 13–14; emphasis added). As we read this sentence (and the opinions in *Gravel* as a whole), the immunity applies absolutely to a committee report and all the other legislative activities associated with it. It does not matter that some may think, e.g., that the Committee acted unwisely in its investigation, or that it went into irrelevant matters, or that its judgment in deciding upon the matters from its record to be included in its report was unfortunate or offensive. See Douglas, J., dissenting in *Gravel,* Slip Op. 3, *supra,* p. 20. For as the Court said in *United States* v. *Brewster,* the Speech or Debate Clause ". . . tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens . . ." (Slip Op. 16).

The immunity sustained in *Gravel* and the "impunity" referred to in *Brewster* are complete; they foreclose any judicial oversight, whether by a suit for an injunction against publication of a legislative document, as here, or for a declaratory judgment or for damages, which petitioners also seek (A. 11–12). For the bar of the Speech or Debate Clause is against any "question[ing] in any other Place".

Even so, petitioners contend that the bar does not apply here. In the last analysis their whole case comes down to this: there was an unconstitutional invasion of the right of privacy in the means whereby the Committee obtained the records included in the report about which they complain; that alleged unconstitutional action tainted the report itself; ergo, they are entitled to sue the Members and their aides on the report (Br. 40–47).

Preliminarily, we note petitioners' subsidiary contention that the enabling resolution of the House (H. Res. 76, *supra,* pp. 5–6) did not authorize the Committee to procure the school records in the manner in which they were obtained, i.e., by respondent investigator Martin's obtention of the records from respondents Savoid and Irven, who were, respectively, the Principal and a teacher at Jefferson Junior High School. The Resolution, petitioners argue "limited the method and circumstances of document production or procurement *to formal procedures during actual hearings of the Committee or subcommittee*" (Br. 42). The contention is frivolous. The Resolution authorized the Committee to "require, by subpoena *or otherwise,* . . . the production of such books, records, cor-

respondence, memorandums, papers and documents as it deems necessary" (emphasis added). The records were obtained by Martin in his capacity as an investigator of the Committee and they were made part of the Committee's record and report of its authorized investigation. It needs no citation of authority to demonstrate that the method used by the Committee in obtaining data relevant to its investigation is commonplace. The Speech or Debate Clause precludes petitioners from questioning the regularity of the Committee's procedures in this regard. For as the Court said in *Gravel* (Slip Op. 9), it was "incontrovertible" "that the Speech or Debate Clause . . . protect[ed] him from criminal or civil liability and from questioning elsewhere than in the Senate, with respect to the events occurring at the subcommittee hearing at which the Pentagon Papers were introduced into the public record." "One of the things normally done by a member 'in relation to the business before it' is the introduction of documents or other exhibits in the record the committee or subcommittee is making. . . ." *Id.*, Douglas, J., dissenting, Slip Op. 3. And the immunity so expressed "applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself". *Gravel,* Slip Op. 11.

Petitioners also make the subsidiary contention (Br. 42–47) that the Committee's introduction of the school records into the record and report of its investigation was in violation of House Rule XI–27(m), which provides that "If the committee determines that evidence or testimony at an investigative hearing may

tend to defame, degrade, or incriminate any person, it shall—(1) receive such evidence or testimony in executive sessions" and afford such person an opportunity to appear. The very terms of this rule refute the contention, for it leaves the determination of such questions to "the committee". And again, the unanimous holding in *Gravel* as quoted above provides the conclusive answer.

Petitioners' assertion of unconstitutionality in the "method of obtaining and publishing petitioners' private, confidential and privileged school records" (Br. 40) is addressed to the activities of the Committee's investigator (respondent Martin) in obtaining the records from employees of the school system (respondents Savoid and Irven). It is the premise upon which their whole case is based. In this way they seek to bring the case within *Gravel's* exception of "illegal or unconstitutional conduct" (Slip Op. 13–14) and, more specifically (Br. 38), *Gravel's* characterization of *Dombrowski* v. *Eastland, supra,* as holding that the Speech or Debate Clause does not protect Members or their aides "if in order to secure information for a hearing . . . [they] seize the property or invade the privacy of a citizen" (Slip Op. 14).

The answers to this contention are manifold. In the first place, the Committee's report is, as we have seen, absolutely privileged, regardless of what it contains. For it, as much as words spoken on the floor of the House, is legislative "speech or debate". The Members and their aides who participated and assisted in the legislative activities of conducting hearings, introducing documents and exhibits into the record,

including the school records in question, and compiling and publishing the legislative report on the basis of the record so made are equally privileged.

This leaves for consideration only the procurement of the school records by respondent Martin, the investigator of the Committee. Petitioners would have it that his conduct was an unconstitutional invasion of their privacy as in *Dombrowski* v. *Eastland, supra.* In answer, we start with the allegations of the complaint. All that was alleged in this respect was that "[u]pon information and belief . . . defendant Savoid [Principal] *gave* defendant Martin copies of the disciplinary letters printed in the report and other materials and . . . defendant Irven [teacher] *gave* defendant Martin copies of the attendance lists, the school test papers also printed in the report and other materials. Upon information and belief, defendants Savoid and Irven were not authorized to release these materials" (A. 9; emphasis added). We do not find in these allegations the slightest resemblance to *Eastland.* There the "committee counsel was charged with conspiring with state officials to carry out an illegal seizure of records which the committee sought for its own proceedings" (*Gravel,* Slip Op. 13) and ". . . relief could be afforded without proof of a legislative act or the motives or purposes underlying such an act." *Id.* 14. Petitioners cannot remake their case here to fit the exception of *Eastland* by their gratuitous assertions that respondent Martin acted "in a surreptitious and clandestine manner" (Br. 39); that he "surreptitiously . . . obtain[ed] the private and confidential documents involved here" (*id.* 41); that

he obtained the records "through surreptitious and clandestine private meetings . . . with a teacher and the principal of the Jefferson Junior High School" (*id.* 42); and that he "seize[d] petitioners' private school records" (*id.* 46). These afterthoughts are unworthy.[11] *Eastland* was on the books long before petitioners filed their complaint. If they had a cause of action against respondent Martin under that decision, they should have alleged it. It is too late in the day for them to attempt to contrive a solution to the dilemma confronting them by the unanimous holding in *Gravel* that all legislative acts and all legislative aides participating in such acts are privileged under the Speech or Debate Clause.

Petitioners assertions that the records were their "private school records" (Br. 40, 46) are equally baseless. The records were the records of the school system. Petitioners had no proprietary or possessory interest in them.[12]

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[11] The Committee's report describes how these materials were obtained. The report incorporates verbatim interviews with respondents Irven and Savoid (pp. 210–212, 254–256). The materials are set out as "attachments" (p. 212) and "enclosures" (p. 254) accompanying the interviews. The test papers, the report states, were "submitted" by Irven "to show the poor reading ability of most of her students" (p. 223; see also p. 243). another attachment was a report by Irven to Savoid on the conduct of a student (p. 253), and the disciplinary letters were enclosures accompanying an interview with Savoid and his Assistant Principal (pp. 254–258).

[12] The Joint Statement of the Superintendent of the D.C. Public Schools and the President of the Board of Education (A. 52–53) and the Board's Policy Statement Regarding Congressional Inquiries (A. 42–43; see Pet. Br. 57), which were submitted to the courts below, were issued subsequent to the release of the Committee's report.

But even such restrictions as are referred to in the preceding footnote cannot prevail against the plenary power of Congress to legislate for the District of Columbia and, specifically, the House's authorization to its Committee on the District of Columbia "to conduct a full and complete investigation and study of . . . the organization, management, operation, and administration of any independent agency or instrumentality of government operating solely in the District of Columbia" (H. Res. 76, *supra,* p. 5). The Resolution authorized the Committee "to require, by subpena or otherwise, . . . the production of such books, records, correspondence, memorandums, papers, and documents, as it deems necessary". If the records had been produced pursuant to the Committee's subpoena, as authorized by the Resolution, there would be no question as to the legality of their obtention. The issuance of a subpoena under such authority is itself a legislative act protected by the Speech or Debate Clause. The fact that the records were "given" by their custodians to respondent Martin in his capacity as an aide of the Committee does not somehow convert their obtention into an unconstitutional act.

Finally, *Gravel* again provides the conclusive answer to petitioners' attack upon respondent Martin's conduct. If the Chairman of the Committee, respondent McMillan, had himself received the records from respondents Savoid and Irven for the purposes of the Committee's investigation and study, there would be no question as to the application of the Speech or Debate Clause. Respondent Martin stands in the same

protected position. For under the unanimous holding in *Gravel*, ". . . the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." Slip Op. 11. The aide, respondent Martin, "must [in this respect] be treated as the . . . [Member's] alter ego" (*id.* 10) or "surrogate" (*id.*, Douglas, J., dissenting, Slip Op. 5).

III

THE LEGISLATIVE ACTION INVOLVED HERE DOES NOT CONSTITUTE A BILL OF ATTAINDER

Petitioners' final claim of violation of a constitutional right is that the report in question constitutes a bill of attainder and as such is not protected by the Speech or Debate Clause (Br. 48–52). The contention is frivolous.

By definition—

> . . . "a bill of attainder, by the common law, as our fathers imported it from England and practiced it themselves, before the adoption of the Constitution, was an act of sovereign power *in the form of a special statute* * * * by which a man was pronounced guilty or attainted of some crime, and punished by deprivation of his vested rights, without trial or judgment per legem terrae." Farrar, Manual of the Constitution (1867) 419. And see 2 Story, Commentaries on the Constitution (5th ed., 1891) 216; 1 Cooley, Constitutional Limitations (8th ed., 1927) 536. It was this very special, narrowly restricted, intervention by the legislature, in matters for which a decent regard for men's

> interests indicated a judicial trial, that the Constitution prohibited. . . . *United States* v. *Lovett,* 328 U.S. 303, 322 (1946), Frankfurter, J., concurring. [Emphasis added.]

However the term may be defined, it is clear that a bill of attainder is a legislative enactment. This is demonstrated by the very authorities petitioners cite in support of their contention—*Cummings* v. *Missouri,* 4 Wall. 277 (1867); *United States* v. *Lovett, supra; United States* v. *Brown,* 381 U.S. 437 (1965); *Wisconsin* v. *Constantineau,* 400 U.S. 433, 443 (1971), Black, J., dissenting. All of these cases involved a legislative act in the form of an enactment.[13] Thus, petitioners' attempt to equate the publication of the report to an enacted law, the only form of legislative action which can constitute a bill of attainder, is contrary to reason and authority.

To state the proposition another way, the Speech or Debate Clause applies to "Committee reports, resolutions, and the act of voting . . . '[i]n short, . . . things generally done in a session of the House by one of its members in relation to the business before it.'" *Gravel* v. *United States,* Slip Op. 11. Such committee reports and other "things generally done" may eventuate in "an act of sovereign power, in the form of a

[13] In the *Cummings* case the bill of attainder was enacted as part of the post-Civil War constitution of Missouri. The *Constantineau* case involved administrative action under the authority of a state statute, and does not involve a bill of attainder. In the dissenting opinion upon which petitioners rely (Pet. 22), Mr. Justice Black said only that the effect of the "sweeping powers" granted by the statute "is practically the same as that of an old common-law bill of attainder." 400 U.S. at 444.

special statute" (*United States* v. *Lovett, supra*) which constitutes a bill of attainder. But such an eventuality would not vitiate the immunity the Speech or Debate Clause affords for the legislative activities which led to the unconstitutional enactment. The Speech or Debate Clause and the Bill of Attainder Clause are operative independently of each other. Here the only legislative acts involved were activities to which the Speech or Debate Clause applies. No "special statute" eventuated to bring the Bill of Attainder Clause into play.

IV

SEPARATION OF POWERS

The Federal Courts do not have jurisdiction to interfere with the publication and distribution of a House Committee report because Article I, Section 1 of the Constitution vests "all legislative power of the United States" in the Congress of the United States. There should be no doubt that a Report of a Congressional Committee is a legislative prerogative. Judicial review of the contents of a report and enjoining of its publication or distribution are assumptions of legislative power and contrary to the Constitution.

Petitioners have requested that certain material be expunged from the Committee report, and the Court of Appeals (A. 54–55) enjoined certain of the non-Member respondents from printing and distributing the report "unless references to the names and addresses of students . . . are deleted." This injunction was continued in effect pending final action by

this Court (A. 116). This selective censorship of a legislative act by the courts is a dangerous precedent which strikes at the foundation of our Constitutional system of government.

The Supreme Court in *O'Donoghue* v. *United States,* 289 U.S. 516 (1933), at 530, struck down an attempted Congressional reduction of judiciary salaries, and recognized the independence of each of the three branches of the Federal Government when it succinctly stated: "The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital . . ."

In a case similar to this, *Methodist Federation for Social Action* v. *Eastland,* 141 F.Supp 729 (1956), a three-judge court held that it was without authority to enjoin the printing and distribution of a Senate Document.[14] Edgerton, CJ., speaking for the Court said (at 731–732),

[14] In this connection, we observe, not *in terrorem*, that the record in this case contains a reference to an incident of recent date which demonstrates the wisdom of the abstentions adjured in the *Methodist Federation* case. The district court below referred (A. 39) to *Hentoff* v. *Ichord*, 318 F. Supp. 1175 (D.D.C. 1970), a case in which the plaintiffs sought to enjoin members of the House Committee on Internal Security, its Chief Counsel, the Public Printer and the Superintendent of Documents from the imminent publication of a report of the Committee entitled, "Limited Survey of Honoraria Given Guest Speakers for Engagements at Colleges and Universities". The report presented "the results of a survey conducted by the Committee's staff without use of any formal process whereby the staff "by correspondence obtained information from a number of institutions of higher learning, listing speakers who had appeared on their campuses". The names thus obtained were "checked against

Nothing in the Constitution authorizes anyone to prevent the President of the United States from publishing any statement. This is equally true whether the statement is correct or not,

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Committee sources in an effort to determine whether or not any of the speakers had been associated with one or more of 12 organizations. In this fashion the Committee isolated the names of 65 individuals. The Report . . . listed the names of each of the individuals so chosen, their alleged associations or affiliations and the honoraria paid them. . . . The Report raised the inference . . . that the sums paid for the speeches might have been made available . . . to the organizations" (id. 1177). The court dismissed the suit as to all parties except the Public Printer and the Superintendent of Documents but enjoined "them from printing and/or distributing or directly or indirectly causing to be printed or distributed, any copy of" the report on the ground that "without any proper legislative purpose [it] infringe[d] on the rights of individuals named therein as protected by the First Amendment . . ." (id. 1183). Beyond noting that the rationale of this decision was, in our view, overruled in *Gravel*, it is significant that the decision was met by House Resolution 1306, 91st Cong., 2d Sess., 116 Cong. Rec. 41355, which the District Judge below, declining to follow his colleague in the *Hentoff* case, read into his oral opinion dismissing the complaint (A. 39–40). This resolution "ordered" the Public Printer and the Superintendent of Documents to "forthwith print, publish and distribute to and for the use of the House of Representatives, the Committee on Internal Security of said House, and those entitled to receive them, the usual number of copies of the report (No. 91–1732) of said Committee on Internal Security titled, 'Report of Inquiry Concerning Speakers' Honoraria at Colleges and Universities', which has this day been duly reported to the House." It "enjoined" "[a]ll persons" from "doing any act" to "obstruct[s], or prevent[s] the performance of [such] work" and from "molesting, intimidating, damaging, arresting, imprisoning, or punishing any person because of his participation in, or performance of, such work". Finally, the Resolution directed that "[c]opies of this resolution . . . be forthwith furnished . . . to . . . the clerks of the United States District Court and of the United States Court of Appeals from the District of Columbia". This

> whether it is defamatory or not, and whether it is or is not made after a fair hearing. Similarly, nothing in the Constitution authorizes anyone to prevent the Supreme Court from publishing any statement. We think it equally clear that nothing authorizes anyone to prevent Congress from publishing any statement.
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> . . . We have no more authority to prevent Congress, or a committee or public officer acting at the express direction of Congress, from publishing a document than to prevent them from publishing a Congressional Record. If it unfortunately happens that a document which Congress has ordered published contains statements that are erroneous and defamatory, and are made without allowing the persons affected an opportunity to be heard, this adds nothing to our authority. Only Congress can deal with such a problem.

The decision in *Methodist Federation* was based on the Speech or Debate Clause but it is to be noted that the court's language bespeaks as well the constitutional doctrine of separation of powers. The Clause is an expression of a specific aspect of that doctrine. (Cf. Pet. Br. 32–37)

Resolution was subsequently characterized as an expression of the House's "displeasure with, and assert[ion of] its independence from what it deemed an intrusion by the judiciary into its prerogatives with respect to its own documents.". *Soucie* v. *David*, 448 F.2d 1067, 1082 (C.A.D.C. 1971), Wilkey, C. J., concurring). Moreover, the District Court Judge who issued the injunction against the Public Printer and the Superintendent of Documents refused to extend that order to cover the second report even though it was conceded to be a restatement of the earlier report.

In *Hearst* v. *Black*, 87 F. 2d 68 (C.A.D.C 1936), plaintiff Hearst sued to enjoin a Special Committee of the United States from copying and using telegraphic messages in the possession of telegraph companies. Reminiscent of petitioners' allegations in the present case, Hearst alleged that this conduct by the Senate Committee deprived him of his constitutional rights and liberties under the First, Fourth, and Fifth Amendments to the Constitution. In the Hearst case, a statute (47 U.S.C. 605) prohibited telegraph companies from disclosing the contents of transmissions. Refusing to say to the Committee and to the Senate that the contents could not be disclosed or used in the exercise by the Senate of its legitimate functions, the Court (at 87 F. 2d 71–2) found the universal rule to be:

> . . . that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised is not a subject for judicial interference.
>
> The Constitution has lodged the legislative power exclusively in the Congress. If a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded. Nothing is better settled than that each of the three great departments of government shall be independent and not subject to be controlled directly or indirectly by either of the others.
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> * * * * *

> If courts cannot enjoin the enactment of unconstitutional laws—as to which proposition there can be no doubt—then by the same token they cannot enjoin legislative debate or discussion of constitutional measures because of the incidental disclosure or publication of knowledge unconstitutionally acquired. If it be insisted that this is the acknowledgement of a power whose plenitude may become a cataclysm, the answer is that the Congress "is as much the guardian of the liberties and welfare of the people as the courts".

Questioning the official publication of a Committee report threatens "the integrity or independence of the House by impermissibly exposing its deliberations to" judicial or executive influence. *Gravel,* Slip Op. 19. To question Congressional discretion as to what facts can or cannot be included in a Committee report, or to enjoin publication or distribution of a Committee report, would be an exercise of legislative power and therefore a usurpation of that power.

Upon ascertaining that a matter is a legislative act, the Courts should not question the wisdom or motives of those exercising their legitimate Congressional discretion.

CONCLUSION

The legislative activities of the legislative respondents involved in this case are immune from "question[ing] in any other Place". The judgment below should be affirmed as to such respondents.

Respectfully submitted.

FRED M. VINSON, JR.,
ROBERT S. ERDAHL,
800 17th Street, NW.,
Washington, D.C. 20006.

WILLIAM C. CRAMER,
JAMES S. RUBIN,
RICHARD M. HABER,
BENTON L. BECKER,
Suite 4100,
485 L'Enfant Plaza, SW.,
Washington, D.C. 20024.

WALTER C. DEVAUGHN,
General Counsel,
Government Printing Office,
Washington, D.C. 20401,

SEPTEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE